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PLEA BARGAINING IN VARIOUS CRIMINAL JUSTICE SYSTEMS

Plea bargaining is a procedure within a criminal justice system whereby prosecutors and defendants negotiate a plea and dispose of a case before trial. It is understood to serve the interest of judicial economy, although it is often pursued to secure the cooperation of defendants to serve as witnesses in other criminal cases in exchange for a "bargain" as to criminal charges against themselves. Plea bargaining is a prominent feature of the criminal justice system in the United States. Several countries, however, have adopted various forms of this institution as part of their criminal justice reforms to the end of reducing their own criminal dockets. These countries include Germany during the 1970s, Guatemala in 1994, Brazil in 1995, Argentina in 1998, Costa Rica in 1998, France in 1998, and Italy in 1989.[1]

I. Plea Bargaining in the United States

The United States has an adversarial, as opposed to inquisitorial, system of justice. Litigation in the United States, both civil and criminal, is characterized by opposing parties who, through their attorneys, present their dispute to a neutral fact-finder—either a jury or a judge.

> [T]he work of collecting evidence and preparing to present it to the court is accomplished by the litigants and their attorneys, normally without assistance from the court. The essential role of the judge is to structure and regulate the development of issues by the adversaries and to make sure that the law is followed and that fairness is achieved.[2]

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[1] *See* Appendix A for brief descriptions of plea bargaining in these countries, and *see generally* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 28 (2004).

[2] ADMIN. OFFICE U.S. CTS., THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION TO JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES, 22 (2001).

In a criminal case, the parties are the prosecutor, who represents the government, and the accused, represented by privately retained counsel or, if indigent, by a publicly compensated private attorney or public defender. In federal court, the prosecutor is an Assistant United States Attorney (AUSA) who works for one of the 94 U.S. Attorney's Offices located throughout the country, which are a subset of the main Department of Justice in Washington, D.C. A criminal defendant has the right to be represented by an attorney.[3] He may hire a private attorney, and, if he cannot afford one, the court will appoint one to represent him at no cost.[4] The right to counsel applies at all critical stages of the criminal prosecution, beginning when a suspect is taken into custody for interrogation through a first-level appeal.[5] While a defendant can waive this right, the waiver must be knowing and voluntary.[6] The Sixth Amendment right guarantees more than just physical presence of counsel; defense counsel must provide effective assistance.[7]

In federal court, when a defendant is first arrested, he is brought before a judicial officer for an initial appearance, where he is informed of the crime or crimes he is alleged to have committed and informed of his rights under the law. A determination is also made as to whether he should be detained before official charges are filed. At this time, if the accused cannot afford an attorney, one will be provided to him at no cost. The attorney may be a full-time member of a Federal Public Defenders' Office, if one exists in the jurisdiction, or, depending on the circumstances, a private attorney compensated pursuant to the Criminal Justice Act may be assigned.[8] Where serious crimes (felonies) are involved, formal written charges are filed either

[3] Gideon v. Wainwright, 372 U.S. 335 (1963).
[4] *Id.*
[5] United States v. Moody, 206 F.3d 609 (6th Cir. 2000).
[6] Faretta v. California, 405 U.S. 1 (1972).
[7] Strickland v. Washington, 466 U.S. 668 (1984).
[8] 18 U.S.C. § 3006A.

as an information drawn up by prosecutor, which is the case in most state prosecutions, or, in the federal system, as an indictment returned by a grand jury.[9] After formal charges are filed and the defendant is served, he is brought out again before the court to hear the formal charges, at which time he must enter a plea. This stage is known as the "arraignment." A defendant may plead "not guilty," "guilty," or "*nolo contendere*."[10] The arraignment typically occurs several days after the initial appearance.

A. Basic Characteristics of Plea Bargaining

Plea bargaining in the U.S. may take place with regard to any crime, including the most serious crimes such as homicide. Plea bargaining can begin as soon as the defendant has been indicted or charged, although usually the defense attorney takes time to review the Government's evidence before getting well into the process. It is quite common that a defendant who pleads "not guilty" at the outset of the case later reaches a plea agreement with the prosecution and is rearraigned in order to enter the guilty plea. This can occur at any time prior to sentencing, but almost always occurs at some point prior to trial.

By obtaining a plea of guilty, the prosecutor avoids the time and expense of trial. In this way, a great number of cases are quickly and efficiently disposed of. In both the federal and state systems, some 90% of cases are resolved by the defendant pleading guilty rather than by going to trial, and the vast majority of these pleas are attained through plea bargaining.[11] The

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[9] A grand jury is a body of (often 23) people who are chosen to sit permanently for at least a month ─ and sometimes a year ─ and who, in proceedings with only the prosecutor, decide whether to issue indictments. *See* FED. R. CRIM. P. 6. A defendant can knowingly and voluntarily waive indictment and proceed on the basis of a charging document drawn by the prosecutor alone, known as an "information."

[10] Fed. R. Crim. P. 11(a)(1). Other forms of please include, "guilty but mentally ill" and "not guilty by reason of insanity." *See also* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIM. PROC. § 21.4 (3d ed. 2007).

[11] In the federal system in 2009, of 94,833 total defendants, 85,665 were convicted, with 83,665 of those pleading guilty. U.S. Courts, *Table D-4, U.S. District Courts—Criminal Defendants Disposed of, by Type*

U.S. Supreme Court has upheld plea bargaining as an appropriate method of resolving criminal cases, describing it as an essential component of the administration of justice.[12] A defendant, however, does not have a constitutional right to receive a plea offer from the prosecutor and a prosecutor who prefers to go to trial has no obligation to initiate a plea bargain.[13]

It is important to note that plea bargaining occurs for more than just the efficiencies it results in. Plea bargaining also occurs when a defendant promises to cooperate as a witness in related or unrelated criminal proceedings in exchange for a promise from the prosecutor of reduced charges or a favorable recommendation to the judge. In this way, the prosecutor is able to obtain information leading to the prosecution of either a co-defendant or multiple defendants associated with a given crime or crimes.[14]

While the state and the federal governments have slightly different rules for plea bargaining, the process is essentially the same. Major commonalities include the right of the defendant to be effectively represented by counsel, fair and rational plea bargaining tactics on the part of the prosecutor, limited or no involvement of the judge in the plea negotiations, and recognition of the justice system's responsibility to the victim.[15]

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of Disposition and Major Offense (Excluding Transfers), During the 12-Month Period Ending March 31, 2009, http://www.uscourts.gov/caseload2009/tables/D04Mar09.pdf (last visited February 26, 2010).

[12] Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971).

[13] Weatherford v. Bursey, 429 U.S. 545 (1977).

[14] One exaggerated example of a plea agreement negotiated for this purpose is the plea agreement reached in the case of Salvatore "Sammy the Bull" Gravano. Gravano was a high-ranking member of the Gotti criminal organization who had personally committed and ordered many murders. In 1991, Gravano agreed to testify for the prosecution against John Gotti, his crime boss, and many of his criminal associates in exchange for a reduced sentence. John Gotti received a sentence of life imprisonment based on Gravano's testimony, and many other members of the Gotti crime organization went to prison, while Gravano pled to a lesser charge of racketeering and was sentenced to only 5 years. Many would characterize this sort of deal as a "pact with the Devil."

[15] *See generally* CRIM. PRO. § 21.3 (3d ed. 2007).

Prosecutors' offices ordinarily establish general policies with respect to handling plea bargain cases. It is considered improper for a prosecutor to bring a greater charge against the defendant than is supported by the evidence simply to gain bargaining leverage.[16]

Most U.S. jurisdictions limit the extent of judicial involvement in plea negotiations between the prosecutor and the defense counsel; the federal system prohibits any judicial involvement in negotiations at all.[17] A principal reason for this is the potential for coercion of a defendant if the judge is involved, wholly apart from the judge's apparent loss of neutrality.

The federal government and about two-thirds of the states provide for consultation between the prosecutor and the victim of the crime before the prosecutor enters into a plea arrangement.[18] This does not mean, however, that the victim is a formal participant in the plea negotiations or that he or she has any control over the process.[19] "The thrust of the prosecution consultation provisions is that the prosecutor is obligated to consider the stated views of the victim, but is entitled in the final analysis to reject them."[20] Nonetheless, in some state jurisdictions the victim is given the opportunity to appear at the plea hearing before the judge and make a statement.[21]

B. The Process of Entering a Plea

After a plea agreement is reached, the defendant comes to court with counsel to enter the plea. While the judge may not have been involved in the plea negotiations, he has an important role once the agreement is reached, since "the judge is under no obligation to grant the

[16] CRIM. PROC. § 21.3(c) (3d ed. 2007).
[17] Fed. R. Crim. P 11(c)(1).
[18] CRIM. PROC. § 21.3(f) (3d ed. 2007).
[19] *Id.*
[20] *Id.*
[21] *Id.*

contemplated concessions merely because the parties are agreeable."[22] The judge can accept or reject the agreement, or can defer his decision until after he has had an opportunity to review the presentence report.[23]

A defendant's plea must be made knowingly, intelligently, and voluntarily.[24] Accordingly, in federal court, the judge must determine that (1) the defendant is competent, and that he understands what he is doing and is not being coerced in any way; (2) he understands the nature and elements of the charge or charges against him, the penalties he faces, and the consequences of his plea; and (3) there is a factual basis for the plea.[25]

In deciding whether the defendant is competent, the judge must be satisfied that the defendant comprehends the nature of the proceedings against him and has the ability to consult with his attorney with reasonable understanding.[26]

In determining whether the plea is free and voluntary, the judge begins by asking the defendant questions that orient him as to time and place (e.g. name, age, education, marital status), as well as whether he is using any drugs or medicines which might affect his understanding and whether he is seeing a mental health professional. The judge not only asks the defendant whether his plea is free and voluntary, he specifically asks whether the prosecution or anyone else has coerced him in any way or has made undisclosed promises in order to induce the "guilty" plea. Asking the defendant these questions in open court creates a record that the

[22] CRIM. PROC. § 21.3(e) (3d ed. 2007).
[23] FED. R. CRIM. P. 11(c)(3)(A). A "presentence report" is created by the probation office, which is staffed by court officials, and describes among other things the defendant's background, criminal history, and medical and psychological condition, and ordinarily provides a sentencing recommendation to the judge.
[24] Boykin v. Alabama, 395 U.S. 238 (1969).
[25] FED. R. CRIM. P. 11(b).
[26] Indiana v. Edwards, 128 S. Ct. 2379, 2384 (observing that standard for competent guilty plea is the same standard for competency to stand trial).

plea was free and voluntary, reducing any chance that the plea will be set aside on appeal on grounds of lack of understanding or involuntariness.

To assure that the defendant is pleading guilty intelligently, the judge is obliged to inform him of the following:

> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
> (C) the right to a jury trial;
> (D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;
> (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
> (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
> (G) the nature of each charge to which the defendant is pleading;
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
> (I) any mandatory minimum penalty;
> (J) any applicable forfeiture;
> (K) the court's authority to order restitution;
> (L) the court's obligation to impose a special assessment;
> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.[27]

The judge then determines whether the defendant understands that, by pleading guilty, he is waiving these rights.[28]

Finally, the judge must be satisfied that there is a factual basis for the plea. In a case that goes to trial, the burden of proof is on the government to prove to the fact finder—typically the jury—that the defendant committed the charged crime beyond a reasonable doubt. However,

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[27] FED. R. CRIM. P. 11(b)(1). The full text of this Rule is set out in Appendix B hereto.
[28] *Id.*

when the defendant enters a plea of guilty, he must admit to the facts underlying the elements of the charged crime or crimes. This is done by having the prosecutor recite the facts after which the judge asks the defendant, under penalty of perjury, to confirm that they are accurate.

C. After the Plea is Entered

If a defendant pleads "not guilty," the judge will set the case for trial.[29] But if the defendant pleads "guilty," a trial becomes unnecessary and the judge will schedule a sentencing hearing. The Supreme Court has held that a defendant is not bound by a negotiated plea if the Government does not live up to its side of the agreement.[30] The law of contracts applies when determining whether a plea agreement has been breached, which means the court may hold either the Government or the defendant to their side of the bargain.[31] The judge may, but usually does not, agree to impose a certain sentence in advance. Where he has not done so, and where a plea agreement merely recommends that he impose a certain sentence, it is not a breach of the agreement if the judge does not follow the sentencing suggestions in the agreement.[32] So long as the prosecutor performs his part of the agreement, the defendant cannot claim a breach of the agreement simply because the court did not follow it.

Either party may withdraw from a plea agreement before the actual entry of the guilty plea by the defendant before the court.[33] After the defendant has entered a plea, the defendant may withdraw the plea for "any fair and just reason" at any time before sentence is pronounced,

[29] A judge must enter a plea of "not guilty" if a defendant refuses to enter a plea or fails to appear in court. FED. R. CRIM. P. 11(a)(4).
[30] Santobello v. New York, 404 U.S. 257 (1971).
[31] United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986).
[32] CRIM. PROC. § 21.2(d) (3d ed. 2007).
[33] Shields v. State, 374 A.2d 816 (Del. 1977); *See* CRIM. PROC. § 21.2(f) (3d ed. 2007).

but this does not occur with great frequency in federal courts and defendants are for the most part held to their agreements.[34]

Other consequences of pleading guilty include waiving nonjurisdictional defects in the case, such as a potentially illegal search and seizure, a coerced confession, improper grand jury selection, denial of the due process right to a speedy trial, entrapment, sufficiency of the arrest, and various prosecutorial defects.[35]

After the plea agreement is accepted, the case goes forward as any case would following trial and conviction. A pre-sentence report is completed by a probation officer, and a sentencing takes place where the prosecutor and the defendant, through counsel, urge the judge to impose one sentence or another.

D. Criticisms of Plea Bargaining

While plea bargaining is a prominent characteristic throughout the state and federal legal systems in the United States, some state jurisdictions have curtailed the practice or forbidden it altogether.[36] A major criticism is the unfettered discretion given to the prosecutor. Another criticism is that an innocent defendant may plead guilty simply because he does not want to risk going to trial, being convicted, and receiving a more severe sentence. At the same time, some victims and some members of the public believe that justice is not served if a defendant is allowed to either plead guilty to a lesser crime or receive a lower sentence, which is seen as a corruption and manipulation of the criminal justice system.[37]

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[34] FED. R. CRIM. P. 11(d)(2).
[35] Tollett v. Henderson, 411 U.S. 258 (1973); Boykin v. Ala., 395 U.S. 238 (1969); McCarthy v. U.S., 394 U.S. 459 (1969).
[36] For example, the State of Alaska and the City of Philadelphia, Pennsylvania, prohibit plea bargaining, while the City of El Paso, Texas, does not allow plea bargaining in felony cases. *See* CRIM. PROC. § 21.1(g) (3d ed. 2007).
[37] *See generally* CRIM. PROC. § 21.1 (3d ed. 2007).

Notwithstanding these criticisms, the U.S. plea bargaining system is a firmly rooted—most would say an indispensable—way of disposing of criminal cases which has virtually no chance of being widely abandoned. Indeed, the success of the U.S. in this regard has led many countries to adopt at least some form of plea bargaining in their own criminal systems. Brazil is a good case in point.

II. The Brazilian Judicial System

The Brazilian judicial system follows the Roman-Germanic civil law tradition and is still largely characterized by inquisitorial features from those traditions. It is said that criminal procedure in an inquisitorial system is "an official investigation carried out by officials of the state in order to determine the truth."[38] In this official investigation, the prosecutor is not so much a party to the case as he is a neutral justice official who, like the judge, is obliged to determine what in fact has happened.[39] The act of negotiating with the defendant has traditionally been considered improper conduct for these officials.[40] Accordingly, "even if the defendant admits guilt, the process ordinarily goes through a formal 'trial' so as to properly apply the law to the facts, then decide the sentence."[41]

The idea of negotiating and bargaining a plea traditionally has not existed within the inquisitorial system primarily by reason of the principle that the "real" truth can never be negotiated.[42] Further, in an inquisitorial system there is ordinarily a requirement of compulsory prosecution, which is to say all cases must go to trial.[43] Article 5 of the Brazil's Federal

[38] Langer, *supra* note 1, at 18.
[39] *Id.* at 37. Accordingly, the defense attorney is not always viewed as an equal to the prosecutor. *See* Leonard L. Cavise, *Essay: The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 808 (2007).
[40] Langer, *supra* note 1, at 37.
[41] Cavise, *supra* note 39, at 808.
[42] Langer, *supra* note 1, at 37.
[43] *Id.* at 11.

Constitution of 1988, for example, states that "ninguém será privado da libertade ou de seus bens sem o devido processo legal" (no one shall be deprived of their freedom or their property without the due process of law). This article has been interpreted to create an obligation on the part of the prosecutor to prosecute all charges for which there is sufficient evidence to justify a conviction, meaning that prosecutors do not have discretion as to which cases they wish to try and those they do not.[44]

Given these inherent differences, it would seem highly unlikely that an inquisitorial system such as Brazil's would ever incorporate procedures associated with the adversarial system such as plea bargaining. Nevertheless, Brazil, along with several other civil law countries with essentially inquisitorial systems, has in fact introduced at least limited reforms inspired by plea bargaining.[45] In effect, these countries have begun eliminating or relaxing the rule of compulsory prosecution.[46] The impetus for these reforms is undoubtedly a result of rapidly increasing crime rates in these countries and the need for greater judicial control of criminal dockets.

A. Criminal Justice Reform in Brazil

In 1995, Brazil introduced a number of limited adversarial criminal procedure reforms which had the goal of diminishing caseloads and creating a more efficient judicial process. Among the reforms was Law No. 9.099/1995, which created the Juizados Especiais Criminais (Special Criminal Courts).[47] Law No. 10.259, introduced in 2001, created Juizados Criminais Federais (Federal Criminal Courts). These courts were created for the purpose of adjudicating minor crimes, specifically crimes carrying punishment not exceeding two years, which include

[44] NOGUEIRA, MÁRCIO FRANKLIN, TRANSAÇÃO PENAL 46, 160 (Malheiros Editores Ltda. ed., 2003).
[45] Langer, *supra* note 1, at 26–28.
[46] *Id.* at 28.
[47] NOGUEIRA, *supra* note 52, at 111–12.

slander, defamation, and libel ("crimens contra a honra"/ crimes against one's honor) and traffic accidents, among others.[48]

The purpose in creating these courts was to avoid having to impose imprisonment for lesser crimes; in effect, less serious offenses were depenalized. "According to the depenalization model, the regular criminal justice system, with its imprisonment penalties, is too harsh and at the same time ineffective in dealing with non-serious criminality. Fines, community work, and reparation to the victim, among other remedies, have been proposed to replace imprisonment."[49] These reforms were not meant to abolish or replace the regular criminal justice system, but instead to make the criminal process more efficient overall by lessening the burden on the formal system and accelerating the adjudication of more serious offenses.[50]

Other basic changes introduced in conjunction with the creation of Brazil's Special Criminal Courts include the introduction of oral pleadings (*princípio da oralidade*), informality (*princípio da informalidade*), economic efficiency (*princípio da economia processual*), and speedy resolution (*princípio da celeridade*).

B. Transação Penal

Most relevant for present purposes, procedures were introduced in the Special Criminal Courts for mediation (*conciliação*) and plea bargaining (*transação penal*) between the prosecutor and the defendant. These activities may occur either before criminal proceedings are initiated or during the preliminary phase of a case. If the evidence in a case in the Special Criminal Courts

[48] *Id.* at 166, 205.
[49] Langer, *supra* note 1, at 61 (footnotes omitted).
[50] *Id.*

suggests that there is probable cause (*opinio delicti*) to believe a crime within the purview of that court has been committed, the prosecutor is authorized to negotiate a plea with the defendant.[51]

However, unlike in the U.S., Brazil's form of plea bargaining was created to avoid the criminal process and criminal sentencing altogether.[52] The prosecutor does not have unfettered discretion in negotiating a plea but is limited to offering either restrictive conditions (*pena restritiva de direito*), and/ or community service (*serviço à comunidade*), and/ or a fine (*multa*).[53] Imprisonment is not an option.[54]

The Special Criminal Court judge can accept or deny the plea agreement but, unlike in the U.S., he must always explain his reasons for denying or accepting the plea agreement, which he does at the preliminary hearing.[55] The role of the judge at the preliminary hearing is of fundamental importance since, as a mediator, he must always seek consensus between the parties.[56]

Once accepted, a plea agreement in Brazil suspends the proceedings and results in the immediate application of the sentence.[57] Again, in contrast with the U.S. system, the defendant is not required to acknowledge criminal misconduct.[58] Therefore, after he serves his alternative sentence, the violation is not included in his criminal record and he is not exposed to civil liabilities.[59] The violation is registered only for the purpose of preventing the granting of another plea agreement if the defendant commits another violation within five years of his first one.[60]

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[51] NOGUEIRA, *supra* note 52, at 160.
[52] *Id.* at 162.
[53] *Id.* at 113, 160.
[54] *Id.* at 161.
[55] *Id.* at 172.
[56] *Id.*
[57] NOGUEIRA, *supra* note 52, at 113, 159–60.
[58] JEFFERSON JORGE, DIREITO PROCESSUAL PENAL 220–21 (Barros, Fischer & Associados ed., 2005).
[59] NOGUEIRA, *supra* note 52, at 163.
[60] *Id.*

III. Conclusion

Plea bargaining has been a useful, indeed a critical, tool in the U.S. criminal justice system because it resolves criminal cases quickly and efficiently, and frequently gives prosecutors access to testimony vital in cases against other criminals. Although plea bargaining originated in connection with the adversarial criminal justice system of the U.S., it has been transplanted, albeit in substantially modified forms, in several traditionally inquisitorial systems.[61] In most of these systems, Brazil's included, the effect of these transplants is still being evaluated. Nevertheless, in a time of overcrowded criminal dockets, plea bargaining, in one form or another, is unquestionably an institution that merits continued careful study by criminal justice systems everywhere.

[61] *See, e.g.*, Appendix A.

APPENDIX A

1. Germany:

> [Plea b]argaining in German criminal cases can take many different forms. Section 153a of the German Code of Criminal Procedure has given rise to what might be called "diversion bargains." Section 153a permits the prosecution to divert (i.e., conditionally suspend) proceedings in exchange for paying a sum of money to a charitable organization or the state or performing charitable work. . . .
>
> [Section 153a covers] several quite serious crimes that are considered felonies in the United States. These include lesser crimes against the person (such as battery), most drug offenses, environmental crimes, and property crimes (such as larceny and virtually all business crimes, regardless of the financial harm caused).
>
> Plea bargaining in Germany also occurs by means of the penal order (Strafbefehl). Issued without a hearing, the penal order informs the defendant that she will receive a specified sentence for a specified crime unless she objects within two weeks, in which case the matter will proceed to trial before the appropriate court . . . The judge must issue the penal order as requested "if no concerns suggest otherwise." This means judges grant virtually all applications for a penal order as a matter of course. Until recently, the prosecutor could seek only fines by penal order. Now, she can request a suspended prison sentence of up to one year, provided the defendant has legal representation. . . .
>
> In addition to diversion and penal order bargaining, bargaining also occurs in [both minor and serious] cases in which the defendant refuses a deal under section 153a or objects to the penal order and requests a trial. In these "judgment bargains," the judge normally offers the defendant more lenient treatment in exchange for a confession in open court. As German judges routinely initiate plea bargaining, defendants regularly face substantial pressure to plead guilty in exchange for leniency. Not only may the defendant hesitate to rebuff an offer from the very judge who will decide her fate at trial, the judge herself may find her impartiality sorely challenged by a recalcitrant defendant.[62]

2. Guatemala:

There are a number of forms of plea bargaining in Guatemala, which are collectively known as "procesos de agilización." They include

> "[C]riterio de oportunidad" ("principle of opportunity"). In the U.S. system, it would be much like discretionary "nolo pros" (dismissals). The criterio de oportunidad applies when a prosecutor determines that the particular facts in a case are such that it makes little sense to carry out the prosecution. . . . In Guatemala, the judge need not accept the prosecutor's recommendation. Such

[62] Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 559-60 (1997) (footnotes omitted).

> dismissals would often occur when the victim and the accused have reached an agreement to repair the damage and compensate the victim, and where the action was not the sort that would result in imprisonment for more than five years.
>
> [Another] mechanism, "criterio de oportunidad para complices o encubridores" ("principle of opportunity for accomplices") is similar to the U.S. concept of witness immunity. In Guatemala, the prosecutor again makes this decision. . . .
>
> Guatemalan law provides a [] mechanism similar to preprosecution diversion in the U.S. This procedure, referred to as "suspensión condicional de la persecución penal," is currently under-used in Guatemala, since no structures, regulations or forms facilitate its use. . . .
>
> [Finally], the "procedimiento abreviado," is a combination of the U.S. concepts of a "guilty plea" proceeding and plea bargaining. Where a prosecutor believes that a sentence of two years or less is "sufficient," then the prosecutor can request this procedure. The procedure also requires: (1) consent by the defendant and the defense attorney, (2) an admission of guilt, and (3) acceptance of the proposed disposition.
>
> In this case, a judge must hear the defendant and consider the criminal evidence presented. The defendant has the right to present mitigating proof or technical issues of innocence. The judge can acquit or condemn. No punishment can exceed the limit recommended by the prosecutor. Alternatively, a judge can refuse to accept the plea, and proceed as if the offer were never made. In this sense, all the elements of the "bargain" (proceso de consenso) are present. Again, there are no forms, structures or regulations beyond the Code itself to govern or give form to these proceedings. Consequently, they are either drastically under-used or are abused for other purposes potentially inconsistent with a rule of law.[63]

3. Argentina:

In Argentina, the plea bargaining system is called “procedimiento abreviado.” It provides that

> the prosecution and the defense can reach an agreement about the sentence at any time between the production of the information (indictment) at the end of the pretrial phase and the determination of the date for trial. This negotiated sentence cannot be greater than six years of imprisonment. As part of the agreement, the defendant must admit to the offense and his participation in it as described in the indictment. The trial court can reject the agreement if it considers the production of additional evidence necessary, or if it fundamentally disagrees with the charges. However, if the trial court accepts the agreement, it must reach a verdict based on the evidence collected in the written dossier. The trial court can still acquit the defendant, but if convicted, the defendant's sentence cannot exceed the length agreed to by the parties.[64]

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[63] Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW. J. L. & TRADE AM. 365, 397-99 (1998) (footnotes omitted).
[64] LANGER, *supra* note 1, at 54-55 (footnotes omitted).

4. France:

In France,

> before the beginning of formal proceedings, the prosecution may offer the defendant the option of diverting his case from the standard criminal trial in exchange for an admission of guilt and the fulfillment of a condition such as paying a fine, turning over any objects used to commit the offense (or objects obtained in the course of the offense), forfeiting his driving or hunting license for a certain period of time, doing community service work, and/or repairing the damage done to the victim. If the defendant accepts the offer, the prosecutor requests that it be validated by the judge. If the defendant does not accept the offer, or does not fulfill the conditions of the agreement, the prosecutor can simply initiate the formal proceedings. . . . [Plea bargaining is] only applied to certain offenses specifically listed in the French Code . . . [and] it is to be applied only to non-serious offenses.[65]

5. Italy:

In Italy, plea bargaining is referred to as "pattaggiamento."

> [I]t has similarities to plea bargaining in the U.S. system, but it also has some significant dissimilarities. For example, the provision does not permit "charge bargaining," where the criminal charge is reduced as part of the bargain to gain a lower sentencing range for the defendant. . . . Another significant difference between plea bargaining in Italy and the United States concerns the range of cases that qualify for plea bargaining. . . . [In Italy,] the range of cases eligible for a possible plea bargaining was broadened in 2003 when the limitation on the final sentence after one-third reduction was raised to five years. This still limits plea bargaining—no crime carrying a sentence of more than 7.5 years can be plea bargained and there are also some specific serious crimes, such as organized crime cases, that the new Code provision states cannot be plea bargained.[66]

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[65] LANGER, *supra* note 1, at 59 (footnotes omitted).
[66] William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 438–39 (2004) (footnotes omitted).

APPENDIX B

Federal Rules of Criminal Procedure, Rule 11:

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines,

or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

APPENDIX C

CAPÍTULO III, DOS JUIZADOS ESPECIAIS CRIMINAIS, DISPOSIÇÕES GERAIS;

SEÇÃO II, DA FASE PRELIMINAR:

Art. 76. Havendo representação ou tratando-se de crime de ação penal pública incondicionada, não sendo caso de arquivamento, o Ministério Público poderá propor a aplicação imediata de pena restritiva de direitos ou multas, a ser especificada na proposta.

§ 1º Nas hipóteses de ser a pena de multa a única aplicável, o Juiz poderá reduzi-la até a metade.

§ 2º Não se admitirá a proposta se ficar comprovado:

I - ter sido o autor da infração condenado, pela prática de crime, à pena privativa de liberdade, por sentença definitiva;

II - ter sido o agente beneficiado anteriormente, no prazo de cinco anos, pela aplicação de pena restritiva ou multa, nos termos deste artigo;

III - não indicarem os antecedentes, a conduta social e a personalidade do agente, bem como os motivos e as circunstâncias, ser necessária e suficiente a adoção da medida.

§ 3º Aceita a proposta pelo autor da infração e seu defensor, será submetida à apreciação do Juiz.

§ 4º Acolhendo a proposta do Ministério Público aceita pelo autor da infração, o Juiz aplicará a pena restritiva de direitos ou multa, que não importará em reincidência, sendo registrada apenas para impedir novamente o mesmo benefício no prazo de cinco anos.

§ 5º Da sentença prevista no parágrafo anterior caberá a apelação referida no art. 82 desta Lei.

§ 6º A imposição da sanção de que trata o § 4º deste artigo não constará de certidão de antecedentes criminais, salvo para os fins previstos no mesmo dispositivo, e não terá efeitos civis, cabendo aos interessados propor ação cabível no juízo cível.